

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

DATACELL EHF.)

VS.)

1:14-CV-1658 GBL

ALEXANDRIA, VIRGINIA
JULY 10, 2015

VISA INC., VISA EUROPE LTD.,
AND MASTERCARD INCORPORATED)

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

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1 (JULY 10, 2015, 10:39 A.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: 14-CV-1658, *DataCell ehf.*
3 *versus Visa, Inc., et al.*

4 THE COURT: Good morning.

5 MR. BINNALL: Good morning, Your Honor. Jesse Binnall
6 on behalf of DataCell.

7 THE COURT: Spell your last name for me.

8 MR. BINNALL: That's B-I-N-N-A-L-L.

9 THE COURT: Good morning.

10 MR. NOONA: May it please the Court, Your Honor.
11 Stephen Noona on behalf of MasterCard. I have with me
12 Mr. Martin Hyman who will be making the argument today for
13 MasterCard.

14 THE COURT: Good morning, Mr. Hyman.

15 Good morning, Mr. Noona.

16 MR. TULUMELLO: Good morning, Your Honor. Drew
17 Tulumello, Gibson, Dunn & Crutcher, for Visa, Inc.

18 THE COURT: Spell your last name for me.

19 MR. TULUMELLO: T-U-L-U-M-E-L-L-O.

20 THE COURT: Thank you, Mr. Tulumello.

21 MR. SILER: Good morning, Judge. Jacob Siler from
22 Gibson Dunn, also for Visa, Inc.

23 THE COURT: Good morning, Mr. Siler.

24 MR. NOONA: Your Honor, Stephen Noona one more time.
25 If it makes sense, there are two major issues on the motions

1 that are before you. We propose to have Mr. Hyman address the
2 jurisdictional issues and Mr. Tulumello to take on the
3 substantive issues. Both counsel are prepared to answer
4 questions on either of the topics, but we thought it would be
5 helpful to narrow down the topics and have one lawyer address
6 each.

7 THE COURT: Brevity is the hallmark of great advocacy.
8 I welcome that suggestion.

9 MR. NOONA: Thank you, Your Honor.

10 THE COURT: Mr. Hyman, if you could tell us -- it's
11 always helpful to tell me at the outset, what is the issue
12 here?

13 MR. HYMAN: The issue with regard to jurisdiction and
14 venue involves the determination as to whether or not the
15 complaint properly alleges personal jurisdiction and venue.

16 The facts are really simple. They are not in
17 dispute. MasterCard, Incorporated, is a Delaware holding
18 corporation with a principal place of business in New York. It
19 has no employees in Virginia, no offices in Virginia, no
20 ongoing activities in the Commonwealth of Virginia.

21 The plaintiff, DataCell, is an Icelandic
22 corporation with no connection to Virginia. It serves, in
23 essence, as a front for an entity called Sunshine Press, which
24 is better known as Wikileaks, another Icelandic company with no
25 discernible connection to Virginia.

1 Defendant Visa Europe is a United Kingdom --

2 THE COURT: Plaintiff says that MasterCard has some
3 relationship with the Virginia government concerning tax
4 refunds. Is that right?

5 MR. HYMAN: No, it's not, Your Honor. MasterCard,
6 Inc., as I indicated, is a holding company. The documents that
7 were referred to in the plaintiff's opposition papers -- and I
8 would point out that the complaint in this case does not make
9 any jurisdictional allegations concerning personal
10 jurisdiction, nor does it make any allegations concerning
11 venue.

12 The papers that were submitted in opposition to the
13 motion attach a page from a website of the Virginia Department
14 of Taxation referring to a program pursuant to which Virginia
15 citizens can obtain tax refunds through a MasterCard debit
16 card. The plaintiff makes this leap of faith and
17 mischaracterizes the program by saying, therefore, MasterCard,
18 Incorporated, has some connection to Virginia.

19 But as we pointed out in our reply papers, Your
20 Honor, that is not true. The program that's being referred to
21 is a program that was administered and entered into between the
22 State of Virginia, Xerox, a company called Local Solutions,
23 which has nothing to do with MasterCard, and Comerica Bank,
24 which is simply a MasterCard licensee that issues MasterCard
25 debit cards.

1 THE COURT: So to be clear, then, MasterCard that's
2 before the Court is a holding company based in New York that is
3 not responsible for the Virginia relationship between Comerica
4 Bank and MasterCard. You're not doing business here. Is
5 that -- that's part of --

6 MR. HYMAN: It's not doing business. It's not
7 transacting business. It's not found here.

8 THE COURT: Okay.

9 MR. HYMAN: And the fact is that --

10 THE COURT: These claims are related to activities
11 that MasterCard is doing in New York. There's nothing
12 connected to Virginia.

13 MR. HYMAN: Interestingly enough, Your Honor, the
14 assertion that MasterCard, Inc., is somehow involved in the
15 issuance of MasterCard debit cards or the acquisition of
16 MasterCard debit card transactions is also incorrect. First of
17 all, MasterCard, Inc., is a holding company. It doesn't do
18 that.

19 Second of all, its operating company, MasterCard
20 International, Incorporated, which is not before the Court, is
21 not an issuer of MasterCard cards. It's not an acquirer of
22 MasterCard transactions. It's simply a licensor of the
23 MasterCard trademark to independent banks, such as Comerica,
24 which issues the card or acquires the transaction. So
25 MasterCard, Inc., has nothing to do with Virginia in this

1 regard.

2 THE COURT: So you're saying that MasterCard, Inc.
3 would not be subject to personal jurisdiction under the
4 long-arm statute in any event?

5 MR. HYMAN: In no event would it be.

6 THE COURT: Well, what about section 12 of the Clayton
7 Act? What about that?

8 MR. HYMAN: Section 12 of the Clayton Act is primarily
9 a provision that deals with nationwide service of process and
10 venue. Courts have interpreted it to also provide for personal
11 nationwide jurisdiction in antitrust cases.

12 THE COURT: All right. Are you supposed to be
13 covering this argument, or is Mr. Tulumello supposed to be
14 covering this argument?

15 MR. HYMAN: No, this is the argument that I'm -- and
16 thank you for raising that.

17 MasterCard -- with regard to section 12, first of
18 all, it's not in the complaint. This is something that the
19 plaintiff came up with after we filed our papers. We pointed
20 it out to the Court. It has been interpreted to provide for
21 personal jurisdiction based on the provision that provides for
22 nationwide service of process. That's how the courts have
23 interpreted it.

24 Our position is that under the *Daimler* decision by
25 the Supreme Court last year, that application of section 12 for

1 personal jurisdiction purposes is highly questionable. It's
2 never been specifically addressed by the court. Some courts
3 still assume that this nationwide personal jurisdiction -- it
4 doesn't matter whether there is or there isn't. Under
5 section 12 you still have to establish the venue provision,
6 which the courts focus on, and they look at it as a matter of
7 due process as well.

8 THE COURT: The D.C. Circuit says you've got to look
9 at the venue provision first before you get to the second part
10 about nationwide service.

11 MR. HYMAN: Well, yes. I mean, if -- well, if you're
12 invoking nationwide service and trying to use that as a basis
13 for a nationwide personal jurisdiction, you still have to
14 satisfy the venue requirement, which means you have to show
15 that the defendant is either found in Virginia or transacts
16 business in Virginia.

17 And the courts have said in that regard, when you
18 look at issues of transacting business and being found,
19 MasterCard, Inc. clearly is not found in Virginia. And when it
20 comes to the issue of transacting business, the courts look at
21 various factors, including the systematic and continuous
22 relationship with the State of Virginia, whether these contacts
23 are substantial, whether they are more than *de minimis*, whether
24 they involve an ongoing business activity in Virginia.

25 We have none of that here. We have no allegations

1 to that effect here. All we have here is a statement that
2 MasterCard did something outside of Virginia that may have
3 affected Virginia citizens who wanted to make donations to
4 Wikileaks using a MasterCard, but of course that's irrelevant;
5 it has nothing to do with venue.

6 And then, of course, the only other citation from
7 the other side is that MasterCard was somehow involved in this
8 Department of Taxation refund program, which, as we've
9 indicated to you, both in our briefs and by affidavit, is
10 simply not correct. And that's stands unrebutted at this
11 point, Your Honor.

12 THE COURT: All right.

13 I've asked you questions that I have.

14 MR. HYMAN: Okay.

15 I think your questions cover the defensible issue
16 here because our position, of course, is if you apply
17 traditional personal jurisdiction concepts, such as general
18 jurisdiction and specific jurisdiction, you don't have that
19 here because MasterCard is not at home here, so it can't be
20 subject to general jurisdiction. And the claims that are being
21 asserted in the complaint do not arise from any contacts of
22 MasterCard with the Commonwealth of Virginia. They have
23 nothing to do with it. There's no allegation that MasterCard
24 did anything in Virginia, so there would be no basis for a
25 specific jurisdiction.

1 And if you apply *Daimler* -- and I would point out
2 that *Daimler* does not carve any out any exceptions for
3 antitrust cases -- you clearly would have no personal
4 jurisdiction, and that should be the rule even under section 12
5 in light of *Daimler*.

6 But putting that aside, you still have to meet the
7 venue requirements of being found or transacting business.
8 They clearly don't. They've made no showing to that effect,
9 nor I submit, Your Honor, could they make any such showing on
10 this record.

11 THE COURT: Thank you.

12 MR. HYMAN: Thank you, Your Honor.

13 THE COURT: Let's do jurisdiction first.

14 MR. BINNALL: Very well, Your Honor.

15 Your Honor, section 12 of the Clayton Act does lay
16 out the jurisdiction that DataCell is relying on in this case
17 in order --

18 THE COURT: So then you're not trying to use the
19 long-arm statute, and you -- you don't have any argument about
20 personal jurisdiction under the long-arm statute. Is that
21 right?

22 MR. BINNALL: Your Honor, I think there is an argument
23 as to Visa as to general jurisdiction, but primarily we are
24 relying on section 12 of the long-arm statute.

25 THE COURT: Well, tell me why you think there's a

1 general jurisdiction for Visa.

2 MR. BINNALL: Your Honor, Visa has more contacts than
3 I would say were in the place in the *Daimler* decision or in the
4 *Goodyear* decision with the Commonwealth of Virginia.
5 Specifically, as we cite in our papers, Visa has an office
6 building, a pretty substantial office building in Virginia that
7 is --

8 THE COURT: Is that the one with the moat you talk
9 about in your papers, the one with the moat?

10 MR. BINNALL: Yes, Your Honor. It's the building with
11 the moat. And employs a substantial number of people in the
12 Commonwealth of Virginia in addition to -- and I admit that
13 this alone wouldn't be enough -- but being registered to do
14 business in Virginia.

15 THE COURT: What does that have to do with the
16 allegations in the complaint?

17 MR. BINNALL: And, Your Honor, those are not alleged,
18 and if those are important for the Court, we would ask leave to
19 actually allege those in an amended pleading.

20 However, Your Honor, I think that we can look at
21 section 12 of the Clayton Act -- and that is the one that is
22 the more clear example of why jurisdiction is proper in this
23 court, is that Congress decided over a hundred years ago, in
24 1914, that there should be a national contacts test for
25 antitrust cases, and the contacts that you're looking for are

1 not states, with states specifically, but it's with the United
2 States of America in general.

3 I am not saying that, because of that, you still
4 don't have to look at due process. But the test for this has
5 been laid out by the Supreme Court for well over 50 years in
6 the *Scophony* decision, Your Honor, where you have some
7 similarities. You have a business that comes over from England
8 to the United States and sets up a United States company, and
9 then that United States company enters into agreements with
10 other United States companies, and the U.S. Government brings a
11 Sherman antitrust action against those entities.

12 The trial court in that case dismissed the action
13 as to the British company, saying that it wasn't found or
14 transacting business in -- in, I believe in that case it was
15 New York. And the United States Supreme Court reversed that
16 decision and said that when it comes to the found or
17 transacting business aspects of the -- well, first of all, the
18 Court said that a national contacts test does not offend
19 traditional notions of fair play and substantial justice.
20 This, of course, is a decision that I believe comes after
21 *International Shoe*, so we're still within the modern rubric for
22 personal jurisdiction.

23 And it goes on to then analyze the venue aspect of
24 section 12, which is the venue provision that we are relying on
25 in this case.

1 THE COURT: Well, let's start with MasterCard. Is
2 MasterCard found in Virginia?

3 MR. BINNALL: It is found and transacting business in
4 Virginia, Your Honor, yes, it is. I would venture that most
5 people in this courtroom, if we pulled out our wallets, we
6 would have a MasterCard or Visa card, oftentimes both, in our
7 wallets. And if we went to any number of retailers within a
8 block of where we're standing right now, we would be able to
9 use that.

10 Now, I understand --

11 THE COURT: Well, I have a declaration that says
12 something quite the contrary, that talks about it being a
13 holding company. Do you have some evidence to the contrary?

14 MR. BINNALL: Well, Your Honor, the holding company is
15 what we have alleged did the bad acts in this case, and its
16 subsidiary is what actually runs the payment processing rubric
17 or scheme that they use for processing --

18 THE COURT: Let's make sure we're on the same page.
19 My impression was that the declaration suggested that
20 MasterCard is a holding company --

21 MR. BINNALL: Yes, Your Honor.

22 THE COURT: -- that has a license arrangement with
23 banks and other financial institutions to use the brand
24 MasterCard.

25 MR. BINNALL: Yes, Your Honor.

1 THE COURT: Do you have any evidence to the contrary?

2 MR. BINNALL: Your Honor, I believe, if allowed to
3 amend our complaint to go more into the aspects of personal
4 jurisdiction, we would be able to -- to show that what
5 MasterCard, Incorporated essentially is doing, either directly
6 or through its subsidiaries, is actually transacting business
7 in the Commonwealth of Virginia by allowing its brand to be
8 used in a way that -- in a payment processing system that the
9 credit card companies have set up largely with banks and with
10 processors, downstream providers, is actually -- would be
11 considered being -- transacting business in the Commonwealth of
12 Virginia.

13 THE COURT: So you just want time to add additional
14 allegations, but you're not saying you have any facts to
15 contradict the declaration that says it's a holding company.
16 You don't have any facts that support that, do you?

17 MR. BINNALL: Not exactly, Your Honor. What I have --

18 THE COURT: All right.

19 MR. BINNALL: Well, what I have is an argument as to
20 what --

21 THE COURT: I was listening to your argument. I was
22 trying to make sure I didn't -- I wasn't missing out on any
23 facts.

24 Now, you sued Visa Europe, Limited --

25 MR. BINNALL: Yes, Your Honor.

1 THE COURT: -- which is a foreign corporation.

2 MR. BINNALL: It is. And they recently noted their
3 appearance in this case. I don't believe that Visa Europe at
4 this point has filed any responsive pleadings before the Court.
5 We have also --

6 THE COURT: Well, they've made their general
7 appearance, so they're waiving personal jurisdiction. Is that
8 what you're saying?

9 MR. BINNALL: Your Honor, I'm not saying that.

10 THE COURT: Okay.

11 MR. BINNALL: I -- I think that just came through
12 yesterday, and I --

13 THE COURT: Oh. Well, I haven't seen it. I just --

14 MR. BINNALL: Yes.

15 THE COURT: -- was asking that question.

16 Well, let me ask you to focus, if you would, on
17 section 12 of the Clayton Act and whether or not you have
18 properly shown venue as it relates to Visa.

19 MR. BINNALL: Yes, Your Honor.

20 As far as Visa goes, I think in -- and Visa -- and
21 in their reply brief I don't think they really dispute the fact
22 that they really are found in Virginia. They have the
23 building, the data center in Virginia. They hire a number of
24 employees in Virginia. They transact a good deal of business
25 in Virginia. Again, they have that moat.

1 They are certainly found here, and they're
2 transacting business here for venue purposes under section 12
3 of the Clayton Act. And -- matter of fact, of course, is --
4 our argument, as I alluded to earlier, that their contacts here
5 are so numerous that it would actually satisfy the *Daimler* and
6 *Goodyear* tests for general jurisdiction.

7 THE COURT: All right. Thank you.

8 MR. BINNALL: Thank you, Your Honor.

9 MR. HYMAN: Your Honor, two -- two briefs comments.

10 The holding company does not do the licensing with
11 regard to MasterCard. There was no reference made in either
12 the complaint or the opposition papers to any operating
13 subsidiary. The operating subsidiary is not before the Court.

14 However, in the declaration that was submitted to
15 you, it is stated that when the operating subsidiary,
16 MasterCard International, Incorporated, licenses banks to issue
17 the credit or debit cards that consumers in Virginia use, that
18 licensing agreement is entered into in New York where
19 MasterCard International, Incorporated is also located, as is
20 Visa, Inc. So therefore, the suggestion that there is some
21 basis for venue here in Virginia against either MasterCard or
22 MasterCard International is purely -- purely speculative.

23 As far as the reference to the amendment of the
24 complaint, I would point out that the plaintiff, DataCell,
25 brought a complaint against these companies in Europe. It was

1 rejected. They filed a complaint in this action. We moved to
2 dismiss it. They submitted an opposition set of papers which
3 essentially tried to rewrite the complaint. We now know what
4 they were going to say in those papers, and explained why that
5 was not going to fly. And now we're hearing yet another story
6 in addition to the venue and the jurisdiction -- and
7 Mr. Tulumello will speak to this -- their claims on the merits,
8 the substance of their complaints, are meritless.

9 And with regard to the --

10 THE COURT: Well, I can't consider merit on a 12(b)(6)
11 motion -- or a 12(b)(1) motion, can I?

12 MR. HYMAN: They're legally deficient.

13 THE COURT: All right.

14 MR. HYMAN: Let me rephrase that. They're legally
15 deficient, as Mr. Tulumello will explain.

16 And with regard to Visa, I would have to defer to
17 Mr. Tulumello on the jurisdictional and venue issues because I
18 don't speak for Visa.

19 THE COURT: All right. Thank you very much.

20 MR. HYMAN: Thank you.

21 THE COURT: Mr. Tulumello, I'll hear from you.

22 MR. TULUMELLO: Good morning, Your Honor. Drew
23 Tulumello for Visa, Inc.

24 I'd like to address the three main reasons the
25 complaint should be dismissed without leave to amend, even

1 assuming there is personal jurisdiction over Visa, Inc.: Lack
2 of antitrust standing; the failure to plead a plausible
3 antitrust claim under the Supreme Court's decision in *Twombly*;
4 and the infirmities of the Virginia state law claims.

5 Turning first to antitrust standing, plaintiffs
6 have failed to allege any plausible market or any harm to
7 competition in any plausible market in the complaint. The
8 plaintiff alleges competition to the marketplace of ideas.
9 That is not a cognizable market under the Sherman Act. It is
10 impossible to define the outer boundaries of the marketplace of
11 ideas, who the producers are in the marketplace of ideas. It
12 is essentially infinite, as Your Honor concluded with respect
13 to the Internet in the *AOL* case.

14 In their briefing papers, they try a new market,
15 which is the news media market. That also is not a cognizable
16 Sherman Act claim. They rely on the Fourth Circuit decision in
17 *Satellite Television* which involved paid television and its
18 economic substitutes in metropolitan Richmond, whereas the news
19 media market, as they concede in page 17 of their own brief,
20 would include every blog, television program, newspaper,
21 magazine, Twitter account. In fact, they say that the
22 competition between participants in the news media marketplace
23 is so widespread that any attempts to limit it for purposes of
24 market definition is futile.

25 And we agree with that. So whether you look at --

1 THE COURT: Well, their paragraph 7 suggests that
2 they're a corporation that services its customers -- include
3 server hosting and technical support. Does that sound like
4 news media to you?

5 MR. TULUMELLO: No, not at all.

6 THE COURT: Now, they do mention Sunshine Press and
7 having an agreement with Sunshine Press to collect money and to
8 share money. In paragraph 15 they talk about the conspiracy to
9 punish Sunshine Press and put it out of business as retribution
10 for disclosure of the State Department cables, Wikileaks. What
11 does that have to do with a market and restraint of trade?

12 MR. TULUMELLO: Your Honor, it has no -- it has no
13 discernible connection at all to any type of market recognized
14 under antitrust law or to any harm to competition in any market
15 recognized in antitrust law. And that's why there is no
16 antitrust standing.

17 And as this Court has held, and the Fourth Circuit
18 has held, the failure to plead antitrust standing is alone
19 fatal, and the complaint can be dismissed on that basis. And I
20 would say in particular, echoing what MasterCard's counsel
21 said, not only did they try to allege a market in the
22 complaint; they tried a whole other set of markets in their
23 opposition brief. It's clear they don't have an antitrust
24 theory for this case.

25 So we would submit --

1 THE COURT: Have they alleged antitrust damages by
2 saying that they lost the opportunity to collect 5 percent of
3 whatever donations might have been made at some point in the
4 future by -- it says, I think, Virginia residents? I'm not
5 sure if that's in the complaint or not. Maybe I made that up.

6 MR. TULUMELLO: No, Your Honor --

7 THE COURT: Would that be an antitrust damage?

8 MR. TULUMELLO: It would not be. So they do -- they
9 make the 5 percent allegation in their tortious interference
10 claim, and that brings up the common distinction between
11 antitrust injury and economic injury. The Fourth Circuit has
12 said repeatedly antitrust injury and simple economic injury are
13 not the same things. The antitrust laws are not a vehicle for
14 bringing traditional tort claims.

15 So the harm to -- the 5 percent harm, if even --
16 credit that allegation and say, okay, DataCell, you were, you
17 know, harmed because you didn't get the 5 percent of these
18 donations. That does not flow from any injury to competition
19 in a recognized or cognizable antitrust market.

20 And so even if it is a type of harm, it is not
21 antitrust injury, as the Fourth Circuit has defined it in
22 multiple cases, *Oksanen* -- even as Your Honor described it in
23 the *AOL* opinion. So I don't think the 5 percent allegation
24 gets them anywhere close to antitrust standing, and again, that
25 alone is fatal on the Sherman Act claims.

1 THE COURT: Well, would their complaint be sufficient
2 under *Bell Atlantic versus Twombly* with allegations of
3 conspiracy -- paragraph 23 says, The defendants successfully
4 conspired with each other.

5 Are there facts that support some agreement to harm
6 the market here?

7 MR. TULUMELLO: No, Your Honor. And so -- standing, I
8 think, ends the analysis. If we then say, okay, we're going to
9 assume they pleaded standing, which we don't think they have;
10 now let's look at, have they pled a viable section 1 claim?
11 Under *Bell Atlantic versus Twombly*, they must plead facts to
12 show an agreement and an unreasonable restraint of trade, and
13 it must be more than conclusory assertions or formulaic
14 allegations.

15 And if you look at their complaint, there's nothing
16 but the conclusory assertion that the defendants conspired.
17 That's literally all the factual support that is offered. And
18 it's precisely the type of formulaic approach, conclusory
19 assertion that *Bell Atlantic versus Twombly* says is
20 impermissible to state a claim.

21 Furthermore, once again, they backed off that
22 theory that's in their complaint when they filed their
23 opposition. The theory of the complaint is that the defendants
24 conspired. What they tell us in the brief is that something
25 very different happened, is that there were multiple what they

1 call separate, independent and parallel conspiracies.

2 And as to Visa, Inc., we apparently engaged in two
3 conspiracies, according to the opposition brief; we conspired
4 with Senator Lieberman and we conspired with Representative
5 King to damage the marketplace of ideas. That's one
6 conspiracy.

7 And then the second conspiracy is we got to
8 together with PBS/Teller and Valitor over in Iceland to
9 conspire to damage the news media market.

10 There's not a single allegation in the complaint
11 about either of those conspiracies. Again, even if -- the
12 allegations -- even if you take the theory in the brief about
13 Visa's interactions with government officials, that would
14 clearly be barred under the Noerr-Pennington doctrine; the
15 antitrust laws regulate business, not politics, not petitioning
16 the government. It doesn't -- that bars any claims about
17 interactions with government officials.

18 And again, there's no relevant market. No
19 allegations of harm to competition with respect to the second
20 supposed conspiracy that we engaged in with those Icelandic
21 entities. And so --

22 THE COURT: I meant to ask you about causation,
23 because you had a nice little chart in your brief about
24 causation on page 5 about all the links you would have to draw
25 to somehow come back to Visa. Do you want to address that?

1 MR. TULUMELLO: Yes, I do, Your Honor.

2 The -- even to prove Article III standing, you must
3 prove immediate causation and redressability. And on the
4 theory that they pled, under -- whether you take the
5 marketplace of ideas or the news media marketplace -- in the
6 antitrust allegations of their complaint they're alleging
7 injury that is really derivative of Wikileaks.

8 When you are talking about suppression of ideas or
9 the news media market, DataCell, by its own allegations, is not
10 in that market. So the reason we put in the chart was to show
11 just how attenuated any injury to DataCell is from an alleged
12 conspiracy somehow aimed at Wikileaks.

13 THE COURT: All right.

14 MR. TULUMELLO: And finally, Your Honor, with respect
15 to the Virginia law claims, the Virginia antitrust law claims
16 are entirely derivative of the federal law claims. Virginia
17 law follows -- as a matter of Virginia law, follows the Sherman
18 Act jurisprudence. And then the two tort claims, tortious
19 interference, civil conspiracy, they both fail for the same
20 reason. Both require, as a predicate for those torts, that
21 there be an allegation of improper means with respect to
22 tortious interference; and civil conspiracy, that there be an
23 unlawful objective.

24 THE COURT: Would restraint of trade be a unlawful,
25 improper means?

1 MR. TULUMELLO: If it were unlawful -- if it -- if you
2 found there were an adequate allegation that there was a
3 relevant antitrust market and that there was harm to
4 competition in that market, then yes, I think an antitrust
5 violation would be a predicate act for a tortious interference
6 claim or for a Virginia civil conspiracy claim.

7 But if you include, as we think you should, that
8 there isn't a viable Sherman Act claim, then the Virginia state
9 law claims fall for the same reasons.

10 And then that would turn us to, finally, whether
11 their request for leave to amend at the end of a complaint
12 should be granted. And this Court followed an approach in *AOL*
13 that we believe should be followed here.

14 They filed the case at the end -- last day of the
15 four-year statute of limitations. They have trotted out the
16 number of different theories as to what is the market, what are
17 the conspiracies. They have had ample time to think about it,
18 and they've tried numerous approaches.

19 There's no visible route to a plausible antitrust
20 claim or harm to competition here. There's just no antitrust
21 theory of the case. And particularly with respect to antitrust
22 standing, there is a clear rule that if the dismissal is for
23 lack of antitrust standing, leave to amend would be futile.

24 And so because the state law claims are simply
25 derivative of the federal law claims, we think the proper

1 disposition of the case would be dismissal without leave to
2 amend.

3 THE COURT: Thank you.

4 MR. TULUMELLO: Thank you.

5 THE COURT: I know you didn't want to talk about
6 personal jurisdiction with Visa. You didn't want to talk about
7 that?

8 MR. TULUMELLO: I'm certainly happy to address it, but
9 I think the -- sort of the answer on the pleading deficiencies
10 is sufficiently clear.

11 THE COURT: All right. Thank you.

12 MR. TULUMELLO: Yeah, thank you.

13 MR. BINNALL: Your Honor, this is admittedly an
14 unusual factual scenario for an antitrust case. DataCell is
15 not suing its competitors for conspiracy against DataCell.
16 Instead, it's suing Visa and MasterCard, companies from
17 different industries completely who decided to play the roles
18 of supreme arbiter in the marketplace of the news media. And
19 the news media marketplace, Your Honor, was specifically pled
20 in the complaint. It was pled, Your Honor, in paragraph --
21 paragraph 29, Your Honor.

22 THE COURT: It says, "injured the media market by
23 suppressing the marketplace of ideas."

24 MR. BINNALL: Exactly. And it's --

25 THE COURT: Where can I buy an idea?

1 MR. BINNALL: I'm sorry. What's that?

2 THE COURT: Where can I buy an idea?

3 MR. BINNALL: Your Honor, you can buy an idea from any
4 number of different media outlets all through the world. And
5 the more appropriate thing is where can you sell an idea,
6 because that's what people in the media market are trying --
7 are doing. They're selling stories and they're selling ideas.
8 And --

9 THE COURT: I had the impression from paragraph 7 that
10 you were a -- it services its customers, including server
11 hosting and technical support.

12 MR. BINNALL: Yes, Your Honor.

13 THE COURT: Where do you say that DataCell is a media
14 outlet?

15 MR. BINNALL: Your Honor, if you look at the
16 attachments to the complaint, there's the agreement we attached
17 with PBS/Teller that shows the partnership between DataCell and
18 Sunshine Press. And what you have to understand about --

19 THE COURT: That was a project to share money, wasn't
20 it?

21 MR. BINNALL: Well, it was, Your Honor, but it was a
22 project to share money because they entered into this
23 partnership together to put together the Wikileaks project.

24 And Wikileaks is not, in itself, a company. It's a
25 website. And it's a website that is run by essentially two

1 different organizations here. You have the content -- and
2 admittedly a bulk of the work is coming from Sunshine Press
3 Productions, and --

4 THE COURT: That's not my problem. I'm just trying to
5 make sure I understand what is DataCell. So --

6 MR. BINNALL: Yes.

7 THE COURT: -- you are saying that DataCell is a part
8 of the media --

9 MR. BINNALL: Well --

10 THE COURT: Let me finish.

11 MR. BINNALL: Oh, I'm sorry, Your Honor.

12 THE COURT: You just told me that Wikileaks is not
13 really a media; it's a website where information can be found.
14 But Wikileaks or Sunshine Media is not before me. What's
15 before me is DataCell. Correct?

16 MR. BINNALL: Yes. Yes, Your Honor, that's correct.
17 DataCell is before you, not Sunshine Press, although our
18 position is Sunshine Press and DataCell together put together
19 Wikileaks.

20 THE COURT: And in paragraph 15 you say it's to punish
21 Sunshine Press and try to put it out of business as retribution
22 for disclosure of State Department cables. You don't say it
23 tried to put DataCell out of business, do you?

24 MR. BINNALL: Yes, Your Honor, and admittedly, Your
25 Honor, that could be more artfully pleaded, which is why, if

1 that point is important to the Court, we would ask leave to
2 replead that, because really it is that they're trying to harm
3 Wikileaks. And the harm to Wikileaks then hurts both Sunshine
4 Press and DataCell. What DataCell --

5 THE COURT: Focus on the antitrust standing, if you
6 would. That might help me --

7 MR. BINNALL: Yes, Your Honor.

8 THE COURT: -- focus you and focus me. I apologize
9 for going on an excursion to the left or right.

10 MR. BINNALL: No, Your Honor, it's, of course, more
11 important what's important to the Court.

12 And as far as antitrust standing goes, Your Honor,
13 first we look at the relevant market. And the relevant market
14 in this case is, as we've defined, the media market. And the
15 court in the *Satellite Television* case -- the Fourth Circuit,
16 Your Honor, goes and talks a good amount about the fact that
17 markets can be broad. And this is a broad market, because what
18 you look at is a marketplace is where commodities are
19 reasonably exchangeable by consumers for the same purpose make
20 up part of the trade or commerce.

21 And in this, when you -- what you're selling is
22 information and ideas. It is -- the media is, admittedly,
23 broad. It's now worldwide. If I want to get my news, I can
24 turn on CNN and I can turn on the BBC. Likewise, if I want to
25 read something, I can go to the WashingtonPost.com, I can go to

1 the Guardian, I can look at any number of different blogs,
2 whether it's local in Alexandria or national or international.
3 And one of the places I can go for information is Wikileaks.

4 And it is part of the -- this international
5 exchange of information and ideas that's part of the media
6 marketplace. And the *Satellite Television* case specifically
7 said you don't want to do a submarket analysis. What you want
8 to do is see what is exchangeable for all of the part of trade
9 or commerce.

10 And when you have two payment processing giants,
11 such as Visa and MasterCard, that step in and say, we're
12 putting a stop to any donations going to a certain competitor
13 in the marketplace, that has an effect on the entire market.

14 THE COURT: Well, I was going to ask you to return to
15 the issue of antitrust damages. What damages do you have? It
16 seems that you're focused in on not being able to collect your
17 5 percent of the donations to Wikileaks. How does that harm
18 the whole market, Mr. Binnall?

19 MR. BINNALL: Well, it harms the entire market because
20 it essentially put Wikileaks pretty close to out of business.
21 And it harms the entire market because it lets media -- it puts
22 media organizations on notice that if they do something that
23 upsets members of the United States Government, the United
24 States Government can then step in and talk to people that it
25 regulates, such a Visa and MasterCard, and put a stop to that

1 media organization, where it couldn't do so legally. The
2 United States Government can't go into this court and ask for
3 an injunction against Wikileaks publishing information. That
4 much is pretty settled as far as the case law goes. They can't
5 go and they can't pass a law that says, Wikileaks can no longer
6 publish its information.

7 So what has happened here -- and this is very
8 different than Noerr-Pennington because it's going the opposite
9 direction. This isn't private companies petitioning the
10 Government for redress of grievances. This is the Government
11 petitioning private companies for redress of the Government's
12 grievances. And there's no constitutional right or other
13 policy that protects the Government to do that. The Government
14 has its own means to do things, and it shouldn't be able to
15 find a way around that.

16 How this all ties back into the antitrust damage --
17 and I understand that this is different from most other
18 antitrust cases, but it still fits within the antitrust
19 rubric -- is that it makes it so that everyone in the media
20 market is on notice that if they upset the United States
21 Government, they may pay the price of not being able to collect
22 any money anymore from companies like Visa and MasterCard and
23 essentially having to go out of business. And that's a huge
24 chilling effect.

25 If, for instance --

1 THE COURT: I understand that position. I think
2 you've made your point. And I have read your brief too.

3 Okay. So then the Virginia claims really rise and
4 fall with the federal antitrust claims. Is that right?
5 Meaning that the Virginia antitrust law is pretty much the same
6 as the Sherman Act and --

7 MR. BINNALL: Yes, Your Honor.

8 THE COURT: -- and what we're left with, then, for
9 tortious interference with business expectancies -- unlawful
10 restraint of trade would qualify as improper means, wouldn't
11 it?

12 MR. BINNALL: It would, Your Honor.

13 THE COURT: All right.

14 MR. BINNALL: And also, for tortious interference, the
15 courts have said you can look at things like ethical conduct to
16 see if there's an improper means.

17 And then -- you know, we propose that, yes, that is
18 what has gone on here is wrongful and unethical conduct.
19 They're trying to shut down a media organization because they
20 disagree with it. And that sets the -- where we need to go as
21 far as tortious interference, and likewise, once you get to
22 that tortious interference, then you have the wrongful act for
23 purposes of conspiracy as well.

24 THE COURT: All right. So yours is a *Bell Atlantic*
25 *versus Twombly* --

1 MR. BINNALL: Yes, Your Honor.

2 THE COURT: -- 12(b)(6) analysis of the complaint.
3 Looking at the four corners of it, where are your facts
4 supporting a conspiracy between Visa and MasterCard,
5 Incorporated? Where are the facts?

6 MR. BINNALL: Yes, Your Honor. If you want to look at
7 paragraph -- they really start, Your Honor, on paragraph 12,
8 and they go on from there -- where you have the Government
9 officials, the members of Congress -- and they're the ones who
10 coordinate the conspiracy. And they coordinate the conspiracy
11 directly with Visa. They coordinate the conspiracy directly
12 with MasterCard.

13 THE COURT: So you're saying that by a congressman
14 calling a credit card company and complaining, that the
15 congressman and the credit card company have entered into a
16 conspiracy to run Wikileaks out of business?

17 MR. BINNALL: Yes, Your Honor. That is our position
18 as to the horizontal conspiracy. It is essentially a spoke and
19 hub-type conspiracy, Your Honor, where you have members of
20 Congress at -- at the center, and they are directly conspiring
21 with the credit card companies.

22 And, indeed, the credit card companies take the
23 action that those individuals at the -- and I would say that,
24 in this part, that the members of Congress are acting in their
25 individual capacities, and then -- so that they are asking Visa

1 and MasterCard to do this. Visa and MasterCard do indeed take
2 efforts successfully to put a stop to the payment processing
3 for Wikileaks.

4 THE COURT: Where do you allege that Visa and
5 MasterCard had a conversation to harm Wikileaks?

6 MR. BINNALL: With each other?

7 THE COURT: Yes.

8 MR. BINNALL: We do not, Your Honor.

9 THE COURT: Okay.

10 MR. BINNALL: And -- but again, so you have conspiracy
11 number one, that horizontal conspiracy that is with each of the
12 credit card companies and the members of Congress. And then
13 you have conspiracy number two which we allege, which is then
14 each of them call PBS/Teller and Korta. And that is someone
15 who is downstream from them in the -- in their payment
16 processing scheme.

17 And that is more of a horizontal conspiracy than a
18 vertical conspiracy, but it is a conspiracy under antitrust
19 law, nonetheless.

20 And we do allege that they did that. And that is
21 more than just alleging parallel conduct. It's alleging that
22 they both did the same thing on the same day, and that the
23 specific actions that we allege that they did, contacting
24 PBS/Teller and then, later, contacting Valitor in Iceland when
25 Wikileaks tried to move its payment processor to another

1 company, that in itself is a combination -- contract or
2 conspiracy under section 1 of the Sherman Act. And that has
3 been properly pled.

4 THE COURT: Well, I've asked you all the questions I
5 have. And I have read your brief.

6 MR. BINNALL: Thank you, Your Honor. And we
7 appreciate the Court's time on that. And I believe that I've
8 covered most of the areas that I wanted to discuss with the
9 Court as well.

10 Thank you.

11 THE COURT: Thank you.

12 MR. TULUMELLO: Your Honor, I think DataCell's
13 presentation confirms that there is no antitrust standing.
14 They've explained that their market is news or information on a
15 worldwide basis, from Alexandria to the Guardian to worldwide.
16 That's not a cognizable antitrust market. That ends the
17 analysis under antitrust standing.

18 Even if you got over that hump with respect to
19 *Twombly*, they've now conceded that they're not alleging that
20 there was a conspiracy or an actual agreement between Visa,
21 Inc., and MasterCard; instead, it's some other conspiracies
22 with Government officials and some folks over in Iceland. So
23 they've not even alleged an agreement, which is the first
24 showing required under *Twombly* before you even get to an
25 unreasonable restraint of trade.

1 And then, furthermore, under the *Twombly* analysis,
2 in terms of evaluating the plausibility of a Sherman Act claim,
3 they need to plead allegations that the actors had an economic
4 incentive to engage in joint conduct, because the goal of the
5 exercise was not something that they could achieve through
6 unilateral conduct. That's the *Vermiculite* case. And it's
7 clear that if the theory here is we were trying to ingratiate
8 ourselves with Senator Lieberman and Representative King, that
9 Visa could have terminated Wikileaks on its own; it didn't need
10 MasterCard or anybody else to -- in order to do the
11 ingratiating.

12 So I think no matter how you -- you look at it --
13 and I think antitrust standing is -- is the sort of bright line
14 easiest approach, but I think no matter how you look at it, the
15 complaint should be dismissed, and for the reasons I mentioned
16 previously, it should be dismissed without leave to amend.

17 THE COURT: All right.

18 Counsel, the matter has been briefed and
19 sufficiently discussed in oral argument. I'll issue a written
20 ruling. I'll take the matter under advisement.

21 Thank you very much. You're excused.

22 MR. BINNALL: Thank you, Your Honor.

23 (PROCEEDINGS CONCLUDED AT 11:23 A.M.)

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1 UNITED STATES DISTRICT COURT)

2 EASTERN DISTRICT OF VIRGINIA)

3

4 I, JULIE A. GOODWIN, Official Court Reporter for
5 the United States District Court, Eastern District of Virginia,
6 do hereby certify that the foregoing is a correct transcript
7 from the record of proceedings in the above matter, to the best
8 of my ability.

9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action in
11 which this proceeding was taken, and further that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

14 Certified to by me this 17TH day of AUGUST, 2015.

15

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17

18

/s/

19

JULIE A. GOODWIN, RPR

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